

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SCOTT J. KUNESH and DEPARTMENT OF THE ARMY,
ARMY NATIONAL GUARD, Honolulu, HI

*Docket No. 99-2438; Submitted on the Record;
Issued October 17, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On September 8, 1998 appellant, then a 27-year-old automotive worker, filed a claim for an occupational disease (Form CA-2) alleging that on June 9, 1998 he first realized his mental stress was caused or aggravated by his employment. He stopped work on August 31, 1998 and returned to work on September 8, 1998.

By letter dated October 30, 1998, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office advised appellant to submit additional factual and medical evidence supportive of his claim. In a November 3, 1998 response letter, appellant stated that he did not have time to submit the requested evidence due to his emotional condition, but that medical evidence would be submitted by his treating psychiatrist.

By letter dated April 5, 1999, the Office advised the employing establishment to submit factual evidence regarding appellant's claim.

In an April 8, 1999 decision, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty.

In response to the Office's April 8, 1999 decision, appellant submitted additional factual evidence. By letter dated April 21, 1999, the Office advised appellant that the evidence

submitted was received on April 19, 1999, which was subsequent to its April 8, 1999 decision. The Office, therefore, advised appellant to exercise his appeal rights.¹

In a May 9, 1999 letter, appellant requested an oral hearing before an Office representative.

By decision dated July 1, 1999, the Office denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of the Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.³

Perceptions and feelings alone are not compensable. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.⁴ To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁵

In the present case, appellant has attributed his emotional condition to discrimination at the employing establishment in an undated narrative statement. However, in an emotional condition claim, for harassment or discrimination to give rise to a compensable disability under

¹ The Board cannot consider the evidence submitted by appellant in response to the Office's April 8, 1999 decision inasmuch as the evidence was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

² The Board notes that subsequent to the Office's July 1, 1999 decision denying appellant's request for a hearing, the Office received additional medical evidence. As found above, the Board cannot consider evidence that was not before the Office at the time of the final decision. *Id.*

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁵ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

the Act, there must be evidence that the alleged acts of harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.⁶

In his undated narrative statement, appellant indicated that he began work at the employing establishment on December 26, 1995 and by February 1996 he was being discriminated against by derogatory comments made to him and Louis Compion, a coworker, by their supervisors Samuel J. Lono and Tracy George. However, there was no corroborative evidence to support appellant's allegations.

Appellant contended that he and Mr. Compion went to see an inspector general concerning favoritism and discrimination at the employing establishment, but they did not receive any feedback. Appellant has further contended that, during a meeting on June 10, 1997 with his coworkers and supervisors, he tried to voice his concerns about favoritism and discrimination, but Major Burgess or Colonel Kaneshi found a way to make excuses or talk around the issue. In response to appellant's contention, Mr. Lono submitted an undated narrative statement providing that "[a]ll complaints were addressed and everyone had a chance to voice their opinions and concerns. The results of the meeting was an agreement among all shop personnel to begin 'with a new slate'" Appellant has failed to establish that he was subjected to discrimination by the employing establishment during the June 10, 1997 meeting.

Appellant has also contended that he was subjected to discrimination at the employing establishment on May 28, 1998 when he told Mr. Lono that he had an appointment the following week to have the stitches in his back removed. He stated that Mr. Lono replied in a derogatory manner. On April 20, 1998 appellant contended that Mr. Lono refused to allow him to use sick leave for his absence on April 17, 1998 due to family problems and required him to use annual leave. He further contended that when he requested three hours of annual leave on June 9, 1998, Mr. Lono responded that "[t]his is the last time you [ha]d better ask for leave or else." Appellant stated that he had had enough for three years and this finally made him seek professional help. An employee's emotional reaction to an administrative or personnel matter is generally not covered. Thus, the Board has held that the use and denial of sick leave relates to an administrative or personnel matter.⁷ Nonetheless, the Board has held that error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in an administrative or personnel matter, may afford coverage.⁸ In response to appellant's contention involving the May 1998 incident, Mr. Lono first noted that the incident occurred in May 1997 and not May 1998. Mr. Lono explained that the shop was preparing equipment for deployment and annual training and that all personnel were advised that annual leave would not be granted during this period except for bonafide emergencies. In response to appellant's contention involving his denial of the use of sick leave, Mr. Lono acknowledged in his undated narrative statement that he did ask appellant to sign for annual leave for April 17, 1998. He stated that appellant became angry because he could not take sick leave. Mr. Lono stated that appellant "had not mentioned any medical problem in the discussion during his telephonic leave request, therefore [he] could not be granted sick leave." The Board finds that appellant has not submitted evidence establishing error or

⁶ *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

⁷ *Donald E. Ewals*, 45 ECAB 111, 124-25 (1993).

⁸ *Margreate Lublin*, 44 ECAB 945 (1993).

abuse by the employing establishment in handling his leave requests, therefore, appellant has failed to establish a compensable employment factor.

Appellant has alleged that he was subjected to discrimination during a meeting on July 27, 1998 where Mr. Lono discussed the implementation of a new rule which required appellant and his coworkers to address him as Command Sergeant Major or boss and that Mr. Lono stated that this new rule was not open for discussion. He stated that he asked Mr. Lono whether this rule was in black and white and Mr. Lono responded no. Appellant also stated that Mr. Lono responded that he was the supervisor and he dictated what goes on. In his undated narrative statement, Mr. Lono explained that there was a need to return to previous “house rules” after there was a change in the climate of the shop after the June 1998 annual training period concerned a lot of bickering about not being treated fairly and some people had more privileges than others. He noted that the change in policy was put into writing and that appellant refused to initial for receipt of it on the grounds that it was reverse discrimination and designed to put pressure on him and Mr. Compion. Mr. Lono stated: “[t]his is not the case. [Appellant’s] stress is not caused by discrimination, but by his inability to deal with new shop rules that are applied to all employees. I have tried to express to the individuals that they should worry about themselves and not the other members of the shop.” In a September 14, 1998 memorandum to the file, Mr. Lono stated that he conducted a meeting on August 31, 1998 with the full-time staff and read verbatim the new policy and requested the staff to sign the original copy upon issuance to verify receipt of the copy. Mr. Lono stated that appellant refused to acknowledge receipt by not signing and replied that he would not sign until he saw the regulation. He noted that appellant did not receive a copy of the regulation.⁹ Appellant has not established that he was discriminated against by the employing establishment’s requirement regarding the proper way to address personnel inasmuch as all of the staff was required to follow this procedure.

Appellant has further alleged that on August 25, 1998, he was subjected to discrimination by an oral reprimand from Mr. Lono because he was late returning from lunch. Appellant stated that Mr. Lono threatened him with a written reprimand and then grounds for dismissal the next time he was late. Appellant’s allegation involves an administrative matter. The Board has held that an oral reprimand generally does not constitute a compensable factor of employment.¹⁰ Appellant has failed to establish that the employing establishment committed error or abuse in issuing an oral reprimand.

Appellant has also alleged that due to discrimination by the employing establishment, he filed a complaint against Mr. Lono with the Equal Employment Opportunity Commission (EEOC). Appellant noted that he had not received a decision from the EEOC. However, the filing of an EEO complaint does not in itself establish harassment or discrimination.¹¹ Appellant did not provide specific details regarding the EEOC complaint. There is no evidence of record establishing that appellant’s complaint had been resolved prior to the Office’s April 8, 1999

⁹ The employing establishment submitted an August 31, 1998 memorandum which listed organizational procedures which included, *inter alia*, the proper way to address personnel, specifically, an organizational maintenance shop supervisor was to be addressed as Sergeant Major.

¹⁰ *Joseph F. McHale*, 45 ECAB 669 (1994).

¹¹ *Alice M. Washington*, 46 ECAB 382 (1994).

decision. Therefore, appellant has failed to establish a compensable factor of employment under the Act.

The Board finds that appellant has established a compensable factor of employment. In his undated narrative statement, appellant contended that he was discriminated against by the employing establishment when he returned to work on May 28, 1998 after receiving stitches in his back. Appellant stated he asked Mr. Lono what he wanted him to do until the following week when he had his stitches removed. In response, he stated that Mr. Lono asked him whether he had a light-duty slip. Appellant responded that he did not have a light-duty slip, but he would provide one. He further stated that he did not receive the slip from his physician until later that day and that Mr. Lono was not around for the rest of the day, thus, he had to perform his regular duties. Appellant then stated that on May 29, 1998 when he gave Mr. Lono the light-duty slip, Mr. Lono stated that there was no such work available. He further stated that Mr. Lono rejected his suggestion that he work in the supply section. Appellant then stated that he spoke with Command Sergeant Major Kahalahoe who told him, "okay, go back down to organization maintenance shop-1, and, as of now, you [a]re on light duty. You can go tell Lono I said so."

Although Mr. Lono's request that appellant submit medical documentation supporting his request for light-duty work involves an administrative matter,¹² appellant has submitted evidence that Mr. Lono erred in handling this matter. In support of his light-duty work restrictions, appellant submitted a May 28, 1997 work slip¹³ from Dr. Douglas W. Chun, a dermatologist, indicating that he may resume work on limited duty. Dr. Chun noted that appellant had undergone a skin lesion biopsy from his back recently and that his activities should involve minimal strain of his back. Appellant also submitted Dr. Chun's June 3, 1997 duty status report (Form CA-17) indicating that he sustained an injury on May 21, 1997 and that he underwent minor surgery on his mid back. The Form CA-17 also indicated Dr. Chun's request for light duty. Inasmuch as appellant has established that he had light-duty work restrictions, that Mr. Lono was aware of these restrictions and Command Sergeant Major Kahalahoe subsequently granted appellant's request for light-duty work, the Board finds that Mr. Lono erred by requiring him to perform his regular duties.

Because appellant has established a compensable factor of employment, the Board will address the medical evidence of record. As discussed above, appellant submitted Dr. Chun's May 28, 1997 work slip and June 3, 1997 Form CA-17. Dr. Chun's work slip and report, however, do not address whether appellant had an emotional condition due to the employing establishment's violation of his medical restrictions.

In further support of his claim, appellant submitted an October 12, 1998 medical report of Dr. Joan H. Koff, a licensed psychologist. In this report, Dr. Koff noted appellant's allegations including, derogatory comments by his supervisor, no response to his complaints from the inspector general, retaliation from the employing establishment due to his filing EEOC complaints and an investigation regarding racial discrimination, and the employing establishment's violation of his medical restrictions. Dr. Koff further noted appellant's psychiatric treatment, physical and emotional complaints, and social background. Dr. Koff

¹² *Thomas D. McEuen*, 41 ECAB 389 (1999), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹³ The Board notes that appellant may have mistakenly alleged that Mr. Lono's denial of his request for limited duty took place on May 28, 1998 rather than May 28, 1997.

provided her findings on mental and psychological examination. She diagnosed Axis I work-related stress and Axis IV moderate work-related stress. She concluded by noting appellant's treatment and plan. Dr. Koff's report is insufficient to establish appellant's claim because she failed to provide any medical rationale explaining how or why appellant's condition was caused by the employing establishment's violation of his medical restrictions.

In addition, appellant submitted Dr. Koff's December 17, 1998 progress notes indicating the date of injury as June 9, 1998. In these notes, Dr. Koff stated appellant felt that he was getting the "silent treatment" from his supervisor and this upset him. The record does not establish that appellant was getting the "silent treatment" from his supervisor. Further, Dr. Koff failed to address whether appellant's emotional condition was caused by the employing establishment's violation of his medical restrictions.

Inasmuch as appellant did not submit rationalized medical evidence establishing that his emotional condition was caused by the employing establishment's violation of his medical restrictions, a compensable factor of employment under the Act, the Board finds that appellant has failed to satisfy his burden of proof in this case.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁴ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹⁵

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁶

In this case, the Office issued its decision denying appellant's claim for an emotional condition on April 8, 1999. Subsequently, appellant requested an oral hearing by letter dated May 9, 1999 which was postmarked May 11, 1999. The Board finds that the hearing request

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

¹⁶ *Henry Moreno*, 39 ECAB 475 (1988).

was made more than 30 days after the Office's decision, and thus, it was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting relevant evidence not previously considered by the Office. Consequently, the Office properly denied appellant's hearing request.

The July 1 and April 8, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 17, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member